

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WSOU INVESTMENTS, LLC *
DBA BRAZOS LICENSING * February 21, 2023
AND DEVELOPMENT *
*
VS. * CIVIL ACTION NOS.
*
DELL TECHNOLOGIES INC., * W-20-CV-480/481/486
DELL INC., EMC CORP *
AND VMWARE INC. *

BEFORE THE HONORABLE ALAN D ALBRIGHT
JURY TRIAL PROCEEDINGS
Volume 1 of 3

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09:01 22 transcript produced by computer-aided transcription.

09:01 23

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09:23 1 that would assist Your Honor.

09:23 2 THE COURT: Hold on one second.

09:24 3 (Off-the-record bench conference.)

09:24 4 THE COURT: I think there was an issue
09:24 5 last week, late last week, about the ripeness of them
09:24 6 being available for me to rule on, but I think that's
09:24 7 been overcome by the passage of time.

09:24 8 And I'm going to overrule all the
09:24 9 objections that were made to Judge Gilliland's reports
09:24 10 and recommendations.

09:24 11 MR. SHELTON: Okay. Thank you, Your
09:24 12 Honor.

09:24 13 And just one more thing that I should
09:24 14 have mentioned, Your Honor, with respect to the '800
09:24 15 damages issue.

09:24 16 If Your Honor is inclined to submit the
09:24 17 issue of damages not to this jury, which of course I
09:24 18 strenuously argue that you must under the Constitution,
09:24 19 there should be, of course, no opportunity for this
09:24 20 plaintiff who has made all of its strategic and
09:25 21 tactical decisions throughout this case resulting in
09:25 22 its damages expert being struck, they should have no
09:25 23 opportunity to put in new opinions, new evidence --

09:25 24 THE COURT: I think we can take that up.

09:25 25 MR. SHELTON: Thank you, Your Honor.

01:07 1 That's fine. It's your choice.

01:07 2 But you're also going to have to reap the
01:07 3 problems that that causes because I have to make sure
01:07 4 the jury understands what is happening.

01:08 5 And it's a fact that there will be -- I'm
01:08 6 deleting what I think -- I'll say it, I think this is
01:08 7 impermissible. Defendant asked me to say: I did not
01:08 8 permit the plaintiff to present evidence regarding
01:08 9 damages for the '800 patent because it's not reliable.

01:08 10 I don't think that needs to be in there.
01:08 11 I think -- but everything else is, in my opinion,
01:08 12 exactly what the law is and what the -- what's going to
01:08 13 happen in the trial.

01:08 14 MR. WALDROP: Your Honor, I understand,
01:08 15 Your Honor. We object, Your Honor.

01:08 16 But there's one question, Your Honor,
01:08 17 that may circumvent all of this, Your Honor, which you
01:08 18 kind of hinted at, Your Honor, which may lead to a
01:08 19 reduction in time for the entire proceeding, Your
01:08 20 Honor, and I'm mindful of the Court's time and very
01:08 21 thankful for this opportunity, Your Honor.

01:08 22 Look, Your Honor. We only -- if there's
01:08 23 one question or two questions that we cannot ask based
01:08 24 on the Court's rulings this morning, then we may be in
01:08 25 a situation, Your Honor -- and depending on what the

01:09 1 Court says, that may obviate the need for all of this.

01:09 2 So I wanted to raise that with Your Honor
01:09 3 because that may put all this aside, if I could.

01:09 4 If we can't -- if we cannot ask, Your
01:09 5 Honor, our expert, and this is the particular question,
01:09 6 just this question alone: Does VMware offer hardware
01:09 7 and software in connection with its vSphere 6.5
01:09 8 product? Is that question permissible or not?

01:09 9 THE COURT: What is the defendants'
01:09 10 position?

01:09 11 MR. ROSENTHAL: Your Honor, our position
01:09 12 is that's exactly what was ruled on today. There is no
01:09 13 hardware.

01:09 14 THE COURT: I thought so too.

01:09 15 Yeah. You are correct, Mr. Waldrop. I
01:09 16 think that's been the subject of at least four
01:09 17 hearings, maybe five hearings, that have been ruled on
01:09 18 by this Court about that issue.

01:09 19 MR. WALDROP: So the only reason why I
01:09 20 was asking, Your Honor, because -- and maybe it was
01:09 21 wrong, Your Honor. I'm doing the very best I can. Our
01:09 22 understanding was that the rulings applied to -- your
01:09 23 ruling this morning applied to specific Dell hardware,
01:10 24 not the existence of hardware.

01:10 25 If that's the case, Your Honor, I think

01:10 1 we're in a situation, Your Honor, given these rulings,
01:10 2 and we would like to preserve for the record and, Your
01:10 3 Honor, either move to continue or make every
01:10 4 preservation of rights that we can as to the '800 and
01:10 5 '360 patent, make offers of proof.

01:10 6 In an interest of time, we may not be
01:10 7 able to do all of that now, but I would want to ask for
01:10 8 preservation of all rights for appeal, Your Honor.

01:10 9 And then maybe make offers of proof after
01:10 10 the jury leaves or however you want to do that, Your
01:10 11 Honor. We weren't prepared to do that because we had a
01:10 12 different understanding, but we are where we are, Your
01:10 13 Honor.

01:10 14 And if that's the case, if that's where
01:10 15 we are, Your Honor, because effectively we've been --
01:10 16 effectively the case is over for us on the '360 patent
01:10 17 and the '800 patent by operation of the rulings, Your
01:10 18 Honor, as to almost summary judgment.

01:10 19 And I have no interest in wasting the
01:11 20 Court's time. We'll just take this up in a different
01:11 21 way, Your Honor. And we'll just proceed on the '133
01:11 22 patent.

01:11 23 THE COURT: So what I hear you saying is
01:11 24 you would want me to sever out two of the three patents
01:11 25 and allow you to go up to the Circuit and appeal my

01:11 1 rulings with respect to the Daubert where I struck the
01:11 2 damages and my rulings with respect to what is and is
01:11 3 not admissible with respect to the hardware?

01:11 4 MR. WALDROP: They're already separate
01:11 5 cases, Your Honor, I believe, consolidated for trial.

01:11 6 THE COURT: So you're asking me to grant
01:11 7 the motion -- you would ask me to grant a motion from
01:11 8 the defendant on those to dismiss them, which would
01:11 9 make them appealable based on my rulings?

01:11 10 MR. WALDROP: Your Honor, there's a
01:12 11 couple ways to do it, because we could also
01:12 12 stipulate -- stipulations are also an issue.

01:12 13 Your Honor, if I could, because like I
01:12 14 said, this was not something -- if I could have one
01:12 15 minute, Your Honor.

01:12 16 THE COURT: You can have as much time as
01:12 17 you need. This is on your clock.

01:12 18 MR. WALDROP: Okay. Well, my case shrank
01:12 19 a lot, Your Honor. So I want to move fast.

01:12 20 THE COURT: Take your time.

01:12 21 MR. WALDROP: All right. Thank you, Your
01:12 22 Honor. I just need a few seconds, Your Honor, a few
01:12 23 minutes.

01:12 24 (Pause in proceedings.)

01:18 25 MR. ROSENTHAL: Your Honor, it's me.

01:18 1 Mr. Waldrop and I have just discussed how we think
01:18 2 would be the appropriate way to proceed in this
01:18 3 circumstance. And we think the appropriate way to
01:18 4 proceed is for us to now make a motion and hear
01:18 5 defendants -- or hear Plaintiff's response.

01:18 6 Our motion is under Rule 56 we move for
01:18 7 judgment as a matter of law that there is no direct
01:18 8 infringement of the '800 and '360 patents on the basis
01:18 9 that those -- the only asserted claims of those two
01:18 10 patents are apparatus claims. The only proffered
01:18 11 evidence in this case that is consistent with the
01:18 12 Court's rulings is that of direct sales of software
01:18 13 alone. And that there is no proffered evidence under
01:18 14 the Court's rulings of the sale of hardware. And as a
01:18 15 result, there will be no evidence of infringement. And
01:19 16 indirect infringement is out of the case.

01:19 17 We also move for the same basis for
01:19 18 judgment as a matter of law that there are no damages
01:19 19 for those two, or at least that the plaintiff cannot
01:19 20 prove any damages for those two patents on the same
01:19 21 basis, because the damages evidence that they have
01:19 22 proffered in this case is tied entirely to the sale of
01:19 23 software which cannot by law infringe apparatus claims.

01:19 24 THE COURT: And in addition to that, on
01:19 25 the '800 the Daubert that I had already granted.

01:19 1 MR. ROSENTHAL: And on that basis as
01:19 2 well, Your Honor.

01:19 3 THE COURT: Okay.

01:19 4 MR. ROSENTHAL: Thank you.

01:19 5 THE COURT: Yes, sir?

01:19 6 MR. WALDROP: Your Honor, for the record,
01:19 7 we would oppose that motion, Your Honor. And we ask
01:19 8 and state that by operation of law, Your Honor, and
01:19 9 your rulings from this morning previously, that we
01:19 10 cannot present a damages case and maybe an infringement
01:19 11 case, Your Honor. And we ask that you enter in your
01:19 12 findings of fact in this case, Your Honor.

01:19 13 THE COURT: A response?

01:20 14 MR. ROSENTHAL: Your Honor, I'm not sure
01:20 15 how an opposition plays here. Either they're going to
01:20 16 present the evidence --

01:20 17 THE COURT: That's what I think as well.

01:20 18 MR. ROSENTHAL: -- or they're not.

19 THE COURT: Right.

01:20 20 MR. ROSENTHAL: And if the answer is that
01:20 21 they're not, then there is no basis to oppose. So we
01:20 22 think it ought to be dismissed with prejudice.

01:20 23 THE COURT: What you have to put on the
01:20 24 record, Counsel -- I understand you're opposing the
01:20 25 motions. But if there's anything substantive with

01:20 1 which you disagree about what Counsel just said -- and
01:20 2 I understand you blame the Court for it and that's
01:20 3 fine, the rulings of the Court for the situation you're
01:20 4 in.

01:20 5 But what I heard Mr. Rosenthal say, I
01:20 6 think you've articulated very clearly on the record
01:20 7 that given my rulings, both with respect to the
01:20 8 hardware and with respect to the Daubert on just the
01:21 9 '800, that a motion -- if my -- if my rulings were
01:21 10 correct -- which Plaintiff disagrees with on the
01:21 11 record -- but if my rulings were correct, then you are
01:21 12 unable to put on evidence that would support a finding
01:21 13 of infringement or damages on -- and I've already -- my
01:21 14 brain's already gone -- on the '800 and the --

01:21 15 MR. ROSENTHAL: '360, Your Honor.

01:21 16 THE COURT: '360 patent.

01:21 17 Do you agree with that?

01:21 18 MR. WALDROP: Yes, Your Honor. We
01:21 19 cannot.

01:21 20 THE COURT: Okay. Then I'm going to
01:21 21 grant those motions. Which what I -- now, let me ask
01:21 22 you all this.

01:21 23 And you can start, Mr. Waldrop, just
01:21 24 because you're up.

01:21 25 I doubt the jury was dramatically

1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
8 correct transcript from the record of proceedings in
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10 I certify that the transcript fees and
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13 Certified to by me this 26th day of
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15
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